Editor's note: Reconsideration sua sponte; reaffirmed in part -- See James W. Smith (On Reconsideration), 55 IBLA 390 (June 30, 1981)

JAMES W. SMITH

IBLA 80-57 Decided March 27, 1980
80-67

Appeal from decision of the California State Office, Bureau of Land Management, cancelling right-of-way. LA 0163131.

Affirmed as modified.

1. Appraisals -- Communication Sites -- Rights-of-Way: Generally

   Appraisals of rights-of-way for communication sites will be upheld where an appellant fails to demonstrate by convincing evidence that the appraisal methods used by the Bureau of Land Management are in error or that the charges are excessive.

2. Accounts: Payments -- Appraisals -- Communication Sites -- Rights-of-Way: Generally

   Pursuant to 43 CFR 2802.1-7(3) increased charges may not be imposed retroactively, but are only to be imposed by the authorized officer after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

3. Accounts: Payments -- Appraisals -- Rights-of-Way: Generally

   A grantee of a communications site right-of-way is properly held in default and his right-of-way is properly cancelled pursuant to 43 CFR 2802.1-7(d) where grantee has failed to pay proper amount of rental for 4 years.

APPEARANCES: Lawrence W. Campbell, Esq., San Diego, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated September 14, 1979, by the California State Office, Bureau of Land Management (BLM), affirming a rental increase, requiring payment, holding grantee in default, and cancelling right-of-way LA 0163131.

The pertinent facts are as follows: By letter/decision dated April 11, 1975, appellant was notified of a rental increase for right-of-way CA 6386 and advised of his right to a hearing with respect thereto. A hearing was held on January 17, 1979. 1/ According to the decision, BLM established at the hearing that the fair market value rental for the right-of-way was $1,500 per annum, commencing January 1, 1976. Prior thereto the annual rental had been $400 per year.

The decision of September 14, 1979, held appellant in default since 1976 for failure to pay sufficient rental. It required appellant to remit $6,633.29 based on the following calculations:

Year	Amt. Due	Amt. Paid	Arrears	Interest Years	Interest (8.5)	Present Due
1976	$1,500	$55	$1,445	3.75	517.14	$1,962.14
1977	1,500	55	1,445	2.75	363.42	1,808.42
1978	1,500	55	1,445	1.75	221.75	1,666.75
1979	1,125	55	1,445 2/	.75	70.98	1,195.98
			$1,173.29			$6,633.29 3/

The decision also charged appellant with violations of the terms of his grant in that he failed to (1) perfect access rights, (2) seek BLM approval for a change in use of an existing authorized facility, and (3) disclose secondary or subsequent uses of the authorized facilities.

1/ The delay between reassessment and hearing was in part due to the circumstance that Mr. Smith earlier appealed to the Board, contending, inter alia, that BLM had no right to reappraise his grant. Mr. Smith has appealed the Board's decision in that matter, 34 IBLA 146 (1978), to the U.S. District Court for the Southern District of California (No. 79-0042-E).

2/ This figure, which should be the difference between the amount due and the amount paid, is in error. Consequently, the corresponding figures in the "Interest" and "Present Due" columns, as well as the totals, are also in error.

3/ Previous BLM decisions (February 2, 1977, and October 8, 1978) had requested appellant to pay arrears rentals for 1976, 1977, and 1978, either at the increased rate of $1,500 under protest, or at the established rate of $400. However, appellant never remitted more than a total of $55 per annum for any of these years.

Appellant first contends that BLM's appraisal was inappropriate in that (1) there were insufficient comparisons with similar sites, (2) the appraisal report failed to show why some sites rather than others were used for comparison, (3) there was no consideration of demand for comparable sites to justify the assumptions in the appraisal, and (4) the grant was appraised on the basis of improvements (power brought to the site) by appellant.

[1] The general standard for reviewing right-of-way appraisals is to uphold the appraisal if no error is shown in the appraisal method used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. Full Circle, Inc., 35 IBLA 325 (1978); Four States Television, Inc., 32 IBLA 205 (1977); Mountain States Telephone & Telegraph Co., 26 IBLA 393, 83 I.D. 332 (1976); Western Slope Gas Company, 21 IBLA 119 (1973); Western Arizona CATV, 15 IBLA 259 (1974); cf. American Telephone & Telegraph Co., 25 IBLA 341 (1976). Appellant has not shown by convincing evidence that the charges are excessive; nor has he raised sufficient doubt and question concerning the methods employed in this appraisal. The appraisal report (Exhibit J) contains a comparison table and detailed summaries of eight communications facilities similar to appellant's. Appellant has taken no issue with this data, nor has he identified what sites should have been employed in comparison. Appellant's general allegations concerning "demand" for sites and "assumptions" in the appraisal report are neither referenced to that report nor supported by his own data, and are therefore without merit. In the absence of compelling evidence that a BLM appraisal is egregiously erroneous, such an appraisal generally may be rebutted only by another appraisal or appraisals. See Glenn T. Norton, 16 IBLA 105 (1974); Western Arizona CATV, 15 IBLA 259 (1974).

Concerning power, the following paragraph in the appraisal report (p. 19) apparently is the object of appellant's challenge:

> Electricity:
>
> > The record shows that Mr. J. W. Smith (LA 0163131) was the first user on the top of Otay Mountain. Mr. Smith operated for several years with self-generated electricity until, under LA 0169272, approved 6-12-61, San Diego Gas and Electric Company built a 12 KV distribution line to the top of the mountain. The record indicates that this line was paid for solely by SDG&E and that hence, under IM 73-295, San Diego Gas and Electric should be charged a rental based upon comparison with sites not having electrical services at the time of the lease, while all other users, including Mr. Smith, should be charged a rental based upon sites with such service.

In Full Circle, supra, the Board stated at 335: "The primary user should not be charged for enhanced values attributable to improvements

made by it." This principal has no application to the case before us since power was brought to the site at the instance and expense of a utility.

Appellant has shown no error in the appraisal methods used by BLM. The appraisal will therefore be allowed to stand.

[2, 3] Appellant also objects to the decision wherein it seeks to impose $1,500 annual rental retroactively for the years 1976-1979. Under Full Circle, supra, a grantee cannot be charged retroactively with an increased rental prior to the authorized officer's decision following the hearing. The relevant regulation, 43 CFR 2802.1-7(a) provides for the fair market value rental of the right-of-way to be determined by appraisal, and requires payments to be made in advance. Subsection (e) provides that new charges may be imposed only after "opportunity for hearing" and "commencing with the ensuing charge year." The date of the authorized officer's decision herein being September 4, 1979, the ensuing charge year is 1980. The decision is therefore in error in assessing appellant $1,500 per year for the years 1976-1979. The proper annual rental for those years is the theretofore established charge -- $400. Appellant is in default by virtue of his longstanding practice of failing to remit correct annual rental. BLM properly cancelled right-of-way LA 0163131 pursuant to 43 CFR 2802.1-7(d).

Our affirmance of this action is dispositive of the appeal. We need not therefore discuss other aspects of the decision or further arguments in the statement of reasons. This case presents no issues of fact, which, if proved, would alter the result. Appellant's request for a hearing is accordingly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the cancellation of right-of-way LA 0163131 is affirmed, and the charges assessed by the decision appealed from are modified as follows:

Year	Amt. Due	Amt. Paid	Arrears	Interest Years	Interest (8.5)	Present Due
1976	$400	$55	$345	3.75	$123.68	$469.13
1977	400	55	345	2.75	87.00	432.00
1978	400	55	345	1.75	53.19	398.19
1979	300	55	245	.75	15.20	260.20
					$279.07	$1,559.52

Appellant is directed to remit $1,559.52 past due rental including interest to the California State Office 30 days from receipt of

this decision, failing which, appropriate action will be taken to protect the interests of the United States.

Frederick Fishman
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I agree that the Bureau of Land Management properly acted within its discretionary authority in cancelling the lease, appellant having been several years in arrears in making the required full payments at the $400 rate. 43 CFR 2802.1-7(d). One approach in such instances would be to require full payment of arrears prior to the scheduling of any hearing on increased rentals, thereby possibly avoiding the expenses attendant upon a hearing.

Joseph W. Goss
Administrative Judge